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Recovery of Future Damages in a Continuing Antitrust Conspiracy: From Lawlor to Zenith and Beyond

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NOTES

The Recovery of Future Damages in a Continuing Antitrust Conspiracy: From Lawlor to Zenith and Beyond

I. Introduction

Section 4 of the Clayton Act[1] authorizes private persons to bring suit to enforce the antitrust laws of the United States. This power was granted with the congressional intent that private suits serve "as a bulwark of antitrust enforcement"[2] and that the antitrust laws fully "protect the victims of the forbidden practices as well as the public."[3] The Clayton Act provides these victims with not only the recovery of all damages incurred, but also the trebling of those damages.

Courts were initially hesitant to permit the recovery of treble damages in private antitrust suits unless positive proof of damages could be shown. Given the nature of antitrust damages this was often a difficult burden for the plaintiffs. Courts today, though, no longer require this high degree of certainty when proving damages, often permitting proof of loss which approaches speculation.[4] The determination of recoverable damages, however, remains

1 15 U.S.C. § 15 (1976) provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." Prior to 1955, § 7 of the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890), also supplied private relief. However, § 7 was repealed under Pub. L. No. 84-137, § 3, 69 Stat. 282 (1955). Thereafter, § 4 of the Clayton Act became the sole basis for such private actions.

2 Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

3 Radovich v. National Football League, 352 U.S. 445, 454 (1957).

4 The history of antitrust damages manifests an increasing flexibility in permitting greater degrees of estimation as the basis for damages determinations. Judicial conservatism during the period up to 1939 required a precise showing of damages by the claimant. In particular, this attitude, stemming from English common law, viewed any estimate of lost profit as too uncertain and speculative to form the basis of an award, regardless of whether it was past, present, or future profit that was in question. Guilfoil, *Damage Determination in Private Antitrust Suits,* 42 NOTRE DAME LAW. 647 (1967). An example of this attitude is the reticence shown by the court in Central Coal & Coke Co. v. Hartman, 111 Fed. 96 (8th Cir. 1901), in which the plaintiff wished to recover a measure of the expected profits of his business of buying and selling coal, profits that he would have made without the alleged price-fixing actions of the defendants. In keeping with accepted judicial doctrine of the time, the court stated that "[a]ctual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment." *Id.* at 98. Based on this principle the court ruled that "the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty." *Id.* at 98.

This initial refusal by the courts gave way to an increasing acceptance of previously inadmissible evidence. The Supreme Court led the way in changing this attitude. In Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931), the Supreme Court pointed out that the amount of the damage was not the element in need of certain proof, but rather, the fact that injury had occurred. Once it could be determined that the wrong had been committed, those damages which were attributable to that wrong could be recovered based on mere approximations. In a later case the Supreme Court upheld a court of appeals' statement that "[d]amages are not rendered uncertain because they cannot be calculated with absolute exactness." Eastman Co. v. Southern Photo Co., 273 U.S. 359 (1927). It was considered sufficient if a reasonable basis of computation was afforded, even though the result would be approximate.

Today, it is accepted practice that recovery of antitrust damages is not limited to those situations where the plaintiff can prove his damages with reasonable certainty. "[T]he trier of fact may make a just and reasonable estimate of the damage based on relevant data and may act upon probable and inferential as well as direct and positive proof." Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 358 F.2d 790 (6th Cir. 1966). *See also* Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946). As stated above, the "older standards requiring 'certainty' of damages have given way to proof of losses which border on the speculative, in order to implement the policy of the antitrust laws." Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874, 887 (1st Cir. 1966).

difficult when the basis of the antitrust suit is not reducible to an act which occurred at a defined time and place. This is especially true when the activity and its effects extend beyond the time of trial. When the injury is of a continuing nature, courts have been faced with the complicated problem of determining which violations the plaintiff may complain of in a single proceeding and what damages the plaintiff will be permitted to recover.

The Supreme Court dealt with this problem in two significant cases. The question of which violations may be the subject of a single suit was answered early in this century in *Lawlor v. Loewe.*[5] The second and more complicated part of the problem, the recovery of future damages, was the basis of the Court's opinion in *Zenith Radio Corp. v. Hazeltine Research, Inc.*[6] The circuit courts have not been able to agree, however, on how to interpret and apply these decisions. This conflict is apparently the result of the refusal of the courts objectively to interpret and apply these decisions. This note will examine this conflict and will show how this division between the courts could easily be rectified. The goal in bridging this division is to permit plaintiffs to recover fully those future damages to which the Supreme Court has said they are entitled.

II. The Continuing Conspiracy: Which Violations and What Damages?

In *Lawlor,* the Supreme Court established that damages in a continuing antitrust conspiracy may be recovered only if they are the "proximate and natural result" of the acts set out in the complaint. Such damages may occur after the filing of the complaint and still be recoverable if they are the result of a violation taking place before the filing of the complaint. According to the Court, however, there may not be a recovery of damages which are or will be the result of continuing violations which have occurred since the time the complaint was filed or which will occur after the time of trial.

The plaintiffs in *Lawlor* were hat manufacturers who employed nonunion labor. Defendants, members of the United Hatters of North America, had persuaded the American Federation of Labor to declare a boycott of plaintiffs' goods in an effort to force plaintiffs to accept unionization. This boycott effectively restrained the conduct of plaintiffs' interstate trade. The defendants were accused of a series of overt acts, continuing over a protracted period of time. The Supreme Court considered this series of violations to be a "continuing conspiracy." Based on these facts the Court created the "*Lawlor* rule."

As a result of the decision in *Lawlor,* subsequent private antitrust plaintiffs attempted to prove that the damage to their businesses was the consequence of *one* act of a permanent nature and not that of a continuing conspiracy. By proving that all damages were the result of a single violation, the plaintiffs could avoid the limitation in *Lawlor* and thereby recover in one proceeding all damages proximately resulting from the alleged act. In *Fontana Aviation Inc. v. Beech Aircraft Corporation,*[7] the court accepted this argument, holding that where the plaintiff's alleged damages resulted from his inability to compete due to

5 235 U.S. 522 (1915).
6 401 U.S. 321 (1971).
7 432 F.2d 1080 (7th Cir. 1970).

defendant's termination of plaintiff's dealership, the plaintiff could recover for all damages as if they were the result of the single act of termination and not the continuing refusal to deal. This situation was often presented in failure to deal situations like *Fontana,* in which it was contended that the initial refusal gave rise to the plaintiff's injury and not the day-to-day continuance of defendant's refusal to do business with the plaintiff.[8]

The majority of courts have not accepted these attempts to characterize the initial conspiratorial action as being an action of a permanent nature.[9] When the violation creates an ongoing state, the courts have held the antitrust violation to be a continuing conspiracy on the theory that a conspiracy is renewed each day of its continuance.[10] Each renewal is seen as a new invasion of the plaintiff's rights, thereby giving rise to a new cause of action. Consequently, instead of recovering for the conspiracy as one entire act, the court permits recovery for only those damages resulting from acts which occur prior to the day of filing.

In *Flintkote Company v. Lysford,*[11] the plaintiffs made virtually the same argument that had been made in *Fontana.* The plaintiff contended that the defendant's initial act of terminating plaintiff's source of supply for acoustical tiles was the only overt act of the alleged conspiracy. Hence, the plaintiff argued that this was an act of a permanent nature. Subsequent damages were, in plaintiff's opinion, to be considered as flowing from this initial act. Continued refusal to deal after this initial act was the result of the initial manifestation of the conspiracy, and not a separate violation in and of itself.

The court concluded that the plaintiff's interpretation of the facts was "incorrect" for

> [i]n the very nature of things [the act of termination] lacked all finality. It could mean no more than that Flintkote, on that day, was absolutely and unalterably opposed to future dealings with the plaintiffs. [The] [a]ppellees confuse[d] unequivocality with permanency. Flintkote's position was neither irrevocable nor immutable. It was under no legal duty to adhere to that position. On the contrary, it was at all times completely free to reconsider and modify its view.[12]

Thus, following the "*Lawlor* rule," recovery could be had only for those damages which were proven to be the result of the individual violations occurring prior to the filing of the complaint.

The normal procedure for the plaintiff to recover damages resulting from acts of the continuing conspiracy which take place after filing of the complaint is for the plaintiff to file a separate suit.[13] This effect of the "*Lawlor* rule,"

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8 *See, e.g.,* A.C. Becken Co. v. Gemex, 314 F.2d 839 (7th Cir. 1963) (withdrawal of a product line).

9 *See, e.g.,* Connecticut Importing Co. v. Frankfort Distillers, 101 F.2d 79 (2d Cir. 1939).

10 *See, e.g.,* Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966).

11 246 F.2d 368 (9th Cir.), *cert. denied,* 335 U.S. 835 (1967).

12 *Id.* at 395.

13 Ironically, the result of increased litigation was the opposite of that foreseen by the Court in *Lawlor.* The goal espoused by the court in *Lawlor,* which decision was affirmed by the Supreme Court, was to achieve economies in judicial administration of the antitrust laws, hoping to be able to dispose of the controversy in a single action. Lawlor v. Loewe, 209 F. 721, 728 (2d Cir. 1913). This result could have been achieved had the lower courts not insisted on concluding that a continuing conspiracy existed whenever an ongoing state was created regardless of whether it was the result of one, initial conspiratorial act, or a series

however, can be partially avoided. Under the present rules of civil procedure, the original complaint may be amended by making a supplemental pleading at trial.[14] Supplemental pleadings obviate the need for separate suits for violations occurring between the filing and the trial. Recovery for violations occurring subsequent to trial, however, may be had only by bringing new actions as the violations occur.

The *Lawlor* decision firmly established that an action could be brought for violations in a continuing conspiracy when the violations had occurred prior to the filing of the complaint. Also, all damages, either past or future, flowing from these violations could be recovered. Likewise, *Lawlor* closed the door to the possibility of recovering for any violations occurring subsequent to filing. Procedural rules now extend this to the time of trial. Later cases filled in the details for determining when an action was part of a continuing conspiracy, and therefore when *Lawlor* would apply. Neither *Lawlor* nor subsequent continuing conspiracy cases establish, however, at what time the plaintiff's cause of action would accrue, nor did they determine what would be the limits on the recovery of future damages. These issues were to be answered in *Zenith.*

III. Interaction of the "*Lawlor* Rule" with the Statute of Limitations—The "*Zenith* Exception"

A. *Section 4(b) of the Clayton Act*

On July 7, 1955, the President signed into law an amendment to the Clayton Act, section 4(b), which now provides for a four-year statute of limitations for private antitrust treble damage suits brought under sections 4, 4(a), or 4(c) of the Act.[15] Although enacted to give uniformity to the statute of limitations in private antitrust suits,[16] this statutory limitation created a greater uncertainty than that which had previously existed with respect to continuing conspiracies. In an attempt to resolve the existing confusion, the Supreme Court gave a definitive interpretation of this statute and its application in continuing conspiracies in *Zenith Radio Corp. v. Hazeltine Research, Inc.*[17] Subsequent lower court decisions indicate, however, that the Court's interpretation has been frequently misunderstood. Furthermore, even if the Court's decision in *Zenith* were correctly and uniformly applied, some fundamental policy problems would remain.

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of overt acts. Had they constrained themselves to deciding that a continuing conspiracy existed only in the latter situation, where there was a series of overt acts (as was the case in *Lawlor*), the result would have been much like that reached in *Fontana, i.e.,* recovery would be permitted for all subsequent damages where it was shown that one overt act gave rise to them. This would permit the conclusion of the case in one action, giving effect to the goal of judicial economy. By adopting the theory that the one overt act could create an ongoing state, however, with a new violation occurring by the simple continuance of that state, the courts forced plaintiffs to bring numerous suits.

14 FED. R. CIV. P. 15(d).

15 15 U.S.C. § 15b (1976) provides in part: "Any action to enforce any cause of action under sections 15, 15a, or 15c [4, 4(a), or 4(c) of the Clayton Act] of this title shall be forever barred unless commenced within four years after the cause of action accrued."

16 Wheeler & Jones, *The Statute of Limitations for Antitrust Damages Actions: Four Years or Forty?,* 41 U. CHI. L. REV. 72, 83 (1973). In Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906), the Supreme Court stated that the state statute of limitations would be applicable to private antitrust suits.

17 401 U.S. 321 (1971).

B. *Pre*-Zenith

The major difficulty the courts face in applying section 4(b) is in determining when the plaintiff's cause of action accrues. This determination is especially difficult in a continuing conspiracy where the violations and damages may last for several years. Before *Zenith,* courts had followed two distinct theories on when the cause of action would accrue. The first theory concluded that only the date of violation would be determinative, while the second held that the plaintiff's cause of action would not accrue until the date of damage.

The court in *Steiner v. 20th Century-Fox Film Corporation*[18] stated that the date of violation would be the determinative point. The court pointed out that although the cause of action in a civil antitrust action would normally arise when the damage is sustained, this would not apply in a continuing conspiracy when, even without further overt acts, damages will continue to run over an extended period of time. The court held that "the statute of limitations runs . . . from the time the blow which caused the damage was struck."[19] Since there are a series of violations in a continuing conspiracy, there will be a new cause of action with each successive "blow." According to the court, the amount of subsequent damage will not affect when the statute of limitations begins to run, but rather the amount to be claimed. To rule otherwise in a continuing conspiracy would, in the eyes of the court, never permit "the cause of action of an injured party to fully develop, nor would there be any limitation upon the right of action, and the beneficent purpose of the statute to delimit the right to sue would be defeated."[20]

By using the "date of violation" theory, the court in *Steiner* attempted to find a balance between the advantage derived from allowing the private plaintiff a chance to recoup losses due to antitrust violations and the disadvantages of allowing such suits to linger indefinitely. Rather than finding a balance, however, the court's decision tipped the scales in favor of the defendants.

Requiring a plaintiff to bring this action within the statutory limitation following the "blows" of the continuing conspiracy effectively limited the damages which could be recovered. Normally only those damages which are not speculative at the time the action is brought may be recovered. The latest date an action may be brought, under the "date of violation" theory, will be the statutory number of years following the violation. If at this time there are any damages which the court considers speculative, these damages will not be recoverable. Because of this potentially detrimental effect on antitrust plaintiffs, later courts have refused to accept *Steiner* as controlling in the continuing conspiracy context.

Citing the immense complexities in applying the *Steiner* decision, the court in *Streiffer v. Seafarers Sea Chest Corporation*[21] refused to adopt the "date of violation" rationale. Rather than analogize the plaintiff's cause of action to an ordinary tort action, the court likened it to actions arising out of a "continuing,

18 232 F.2d 190 (9th Cir. 1956).
19 *Id.* at 194.
20 *Id.* at 195.
21 162 F. Supp. 602 (E.D. La. 1958).

but abatable nuisance, where the incidence of continuing damage may depend on speculative factors.''[22] In such situations the cause of action comes into existence as of the date of actual damage rather than accruing at the time of violation. The court reasoned that this should likewise be the applicable standard in continuing conspiracy actions since the future damages which the plaintiff wishes to recover are often of a speculative nature. As the court stated, it is possible that ''[t]he conspiracy may cease, or a change in the business climate may render its efforts harmless to the plaintiff, or the plaintiff may voluntarily abandon his enterprise.''[23]

This ''date of damage'' approach helps the plaintiff's cause, since instead of denying the plaintiff his cause of action where the damages are speculative, as would be the case under *Steiner,* the cause of action is preserved, thus accruing only when the damages have become actual and apparent. Although the cause of action may be delayed, it will not be entirely lost. By following the ''date of damage'' rationale, however, any desirable effect to be gained in having a statute of limitations would be defeated.

Under the ''date of damage'' theory, the plaintiff would have a new cause of action, and therefore, a new statutory period within which he could bring suit, with each successive occurrence of damage. This would hold true regardless of whether the damage comes four years or forty years after that violation. Thus, ''the beneficent purpose of the statute to delimit the right to sue,''[24] spoken of in *Steiner,* would be completely undermined.

The effect of the ''date of damage'' theory was made evident in *Hanover v. United Shoe Machine Corp.*[25] In *Hanover* the Supreme Court rejected the view that the cause of action arose at the earliest violation, and embraced the ''date of damage'' theory set out in *Streiffer.* The plaintiff in *Hanover* alleged that the defendant had obtained a monopoly of the shoe machinery market by offering its machines only for lease and not for sale. The earliest impact of injury on the plaintiff as a result of this leasing arrangement was alleged by the defendant to be in 1912, when the scheme was first implemented. The defendant alleged that the plaintiff's cause of action had therefore accrued in 1912 and was thus barred by the then-applicable statute of limitations. In 1955, the year the suit was brought, the Court rejected the defendant's contention, stating that in this case they were not ''dealing with a violation which, if it occurs at all, must occur within some specific and limited time span.''[26] Instead, the Court found that they were dealing with conduct which constituted a continuing violation of the antitrust laws and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury that was being inflicted in 1912, the Court held that it was equally entitled to sue in 1955 for any damages which were continuing to occur in 1955.[27] Thus, according to the Court's decision in *Hanover,* the continuing conspiracy plaintiff may obtain

22 *Id.* at 606.
23 *Id.*
24 232 F.2d at 195.
25 392 U.S. 481 (1968).
26 *Id.* at 502 n.15.
27 *Id.*

recovery for damages, regardless of when they occur, even if it is forty-three years after the initial violation.

C. *The* "Zenith *Exception*"

The blessing given to the "date of damage" theory in *Hanover* was short-lived. In 1971, when faced with the question of how to apply section 4(b) in a continuing conspiracy, the Court attempted to take the best from both the earlier theories, and thereby render justice to both potential plaintiffs and defendants.

This hybrid, known as the "*Zenith* exception," was created pursuant to litigation in which Hazeltine Research Inc. (HRI) brought suit against Zenith Radio Corp. (Zenith) for patent infringement.[28] In 1963 Zenith counterclaimed, alleging that HRI had violated the antitrust laws by its participation in patent pools in Canada, Great Britain, and Australia. Zenith claimed that by the existence of these patent pools, it had been systematically excluded from selling in the three countries. The trial judge found in favor of Zenith, awarding it damages in the amount of $16,238,872 before trebling.

HRI moved to amend its reply to Zenith's counterclaim and to reopen the record for the taking of additional evidence. In its motion HRI argued that Zenith's counterclaim was barred by section 4(b) of the Clayton Act. HRI contended that those damages awarded to Zenith for the period 1959-1963 were caused by conduct occurring prior to 1959. Since Zenith's counterclaim was brought more than four years after that conduct, HRI maintained that the statute of limitations barred recovery. The trial judge permitted the filing of the limitations defense and subsequently reduced the damage award with respect to the Australian and English markets as a result of it. He refused, however, to reduce the damage award for the injuries to Zenith in the Canadian market.[29]

The court of appeals reversed the district court decision on the ground that Zenith had failed to prove injury to its business in any of the three markets, thereby denying Zenith's recovery completely.[30] The Supreme Court, in its first review of this case, affirmed the court of appeals' decision denying recovery for the injury allegedly incurred by Zenith in the English and Australian markets, but it reversed as to the Canadian market, stating that Zenith had proved damage to its business in that market.[31] The Court noted that some of the damages awarded Zenith were the result of pre-1959 conspiratorial conduct, but based on the belief that the trial judge had either rejected the statute of limitations defense on the merits or had deemed it waived, it said nothing further on the subject.[32]

On remand to determine damages, the court of appeals found that the trial court had neither deemed the statute of limitations to have been waived by

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28 Hazeltine Research, Inc. v. Zenith Radio Corp., 239 F. Supp. 51 (N.D. Ill. 1965), *modified,* 388 F.2d 25 (7th Cir. 1967), *aff'd in part,* 395 U.S. 100 (1969), *on remand* 418 F.2d 21 (7th Cir. 1969), *cert. granted,* 397 U.S. 979 (1970), *rev'd,* 401 U.S. 321 (1971).

29 239 F. Supp. 51.

30 388 F.2d 25.

31 395 U.S. 100.

32 *Id.* at 117 n.13.

HRI, nor had it rejected this defense on the merits. The court therefore sent the case back to the trial court to determine to what extent, if any, the original damages awarded by the trial court should be reduced given the acceptance of the limitations defense.[33] The Supreme Court once again granted certiorari.[34]

Zenith had originally contended that the conspiracy by HRI and other co-conspirators had lasted for several years prior to the filing of the counterclaim in 1963. In its counterclaim Zenith had stated that even though this was true, it wished to obtain damages only for what it termed the "four-year statutory damage period," 1959 through 1963. Zenith claimed that as a result of the conspiracy, it had lost profits in the Canadian market after January 1, 1959, totalling $6,300,000. Even though it was certain that some of these damages were the result of pre-1959 conspiratorial conduct, Zenith claimed recovery for all damages suffered during this period. In its motion for relitigation, HRI contended that the portion of the damages which was the result of pre-1959 conspiratorial conduct was barred by the statute of limitations. Furthermore, HRI argued that because it had committed no damaging overt acts during the 1959-1963 period in furtherance of the conspiracy, all of the alleged damage claims would be barred.[35]

Reversing the court of appeals' decision, the Supreme Court rejected HRI's contention that recovery under section 4(b) may be had only for those damages resulting from overt acts committed during the four-year statutory period prior to the filing of the action.[36] The Court highlighted the present-day importance of the "*Lawlor* rule" in its decision, explaining that it was an accepted principle that with each passing day of a continuing conspiracy a new violation occurs and, therefore, a new cause of action accrues. The Court also noted that it was generally accepted that the plaintiff in a continuing conspiracy may recover all damages resulting from pretrial violations in a single proceeding, regardless of whether the damages are suffered prior to or subsequent to the time of trial.

Regarding the application of the statute of limitations, the Court stated that normally a plaintiff's cause of action will accrue on the date of violation. The Court saw itself faced with a dilemma, however, if it were to apply the "date of violation" theory when the violations were the result of a continuing conspiracy. The Court's difficulty in attempting to apply the "date of violation" standard to a continuing conspiracy was the same in attempting to apply the same type of standard set out in the *Steiner* decision. By forcing plaintiffs to bring their private antitrust suits within four years of violation, the plaintiffs would be effectively barred from recovering those future damages which are speculative at the time the action is brought. At first, this result would appear justified. Although the courts are extremely lenient in determining what is

33 418 F.2d 21.
34 397 U.S. 979.
35 401 U.S. at 326-29.
36 Although not determinative on the question of Zenith's ability to sue for recovery of damages suffered during the limitations period from pre-limitations conduct, it should be noted that the Court also held that by reason of Government antitrust actions brought against several of HRI's co-conspirators, the statute of limitations was tolled from November 24, 1958, to November 1, 1963, pursuant to 15 U.S.C. § 16(b) (1976). Thus, the Court held that the question before it was whether Zenith could recover in its 1963 suit for damages suffered after January 1, 1959, as the consequences of conspiratorial conduct prior to 1954—four years prior to the date the statute was tolled.

speculative, there must remain a point when the courts conclude that future damages are too speculative to permit recovery. When considered from the standpoint of a plaintiff, however, the result appears inequitable.

The plaintiff in a continuing conspiracy is permitted to recover for successive violations, namely, the day-to-day renewal of the continuing conspiracy, up to the date of trial. Under the "date of violation" approach, the plaintiff's cause of action accrues for each of the violations at the time it occurs. The plaintiff is thus required to bring suit within four years of the accrual date. When the plaintiff is the victim of a "noncontinuing conspiracy," that is, where the violations are of a permanent nature, he may take full advantage of the four-year statutory period to ensure that the future alleged damages, or at least a major portion of them, are ascertainable by the day of trial. The plaintiff in a continuing conspiracy, however, may not enjoy the same luxury unless he wishes to bring successive suits within four years of each violation. If the plaintiff does not follow this alternative, he will not be able to benefit from the four-year statutory waiting period to the same extent for all the alleged violations. The more recent the violation, the more likely that the future damages will be speculative at the time of trial. Those damages which are not ascertainable at the time of trial, regardless of the time of violation, will not be recoverable.

Attempting to solve this dilemma, the Court in *Zenith* decided that in a continuing conspiracy, in which it is determined that future damages are too speculative to recover at the time the action is brought, no cause of action will accrue, and, therefore, no statutory limitation period will begin to run. The Court concluded that the cause of action for these future damages "will accrue only on the date they are suffered."[37] From that date the plaintiff will have four years within which to bring his action.

By "suffered" the Court meant the date on which the damages were no longer speculative, that time when they become ascertainable, and not the actual date of damage. Injuries are "suffered" as of the date they can be reasonably ascertained, as much as if the plaintiff were forced to wait until the actual date of damage.[38] Given the Court's previous conclusion that the only reason future damages would not be recoverable in the original action brought within four years of the violation is that the damages were speculative, it logically follows that the Court would permit their recovery when, and if, they cease to be speculative.[39]

When the Court applied its decision to the facts in *Zenith* it pointed out that the determination of whether the future damages are speculative within four years of the violation need not be determined in a court decision made within that four-year period. According to the Court, it was necessary only to show that had Zenith brought an action within the statutory period following the violation, a court would have determined that the damages for which recovery

37 401 U.S. at 338.

38 This interpretation of "suffered" may be easily deduced from the Court's opinion even though no specific definition is given by the Court itself.

39 Wheeler & Jones, *supra* note 16, at 76. This conclusion is also supported by looking at the contrasting manner in which the Court uses the words "speculative" and "suffered." The Court sees these words as opposites, stating that those damages which are not "too speculative" are considered to have been "already suffered." 401 U.S. at 337. Thus, those damages which are "suffered" would be those which have ceased to be speculative, and not necessarily those which have already materialized.

is sought would then have been unascertainable. The Court concluded that Zenith had met this test. Had Zenith brought the case within the statutory period following the violation, the Court believed that those damages which occurred from 1959 to 1963 would have been speculative. Thus, the Court held that Zenith had brought its claim for the 1959-1963 damages within the statutory period established under section 4(b).

The Court, therefore, refused to accept fully either the *Steiner* "date of violation" approach, or the "date of damage" theory set out in *Streiffer,* and followed by the Court in *Hanover.* Instead the Court created the *"Zenith* exception." Under this exception the plaintiff's cause of action is considered to accrue on the date of violation, *except* in circumstances where it is determined that certain damages which the plaintiff wishes to recover are either too speculative at the time of trial, if an action is brought within four years of the violation, or that they would have been speculative had an action been brought within that four-year time period. When the exception is determined to apply, the date of damage, defined as the date when the future damages are no longer speculative, will determine when the cause of action will accrue.

IV. Beyond *Zenith*

In order to profit from the "*Zenith* exception," plaintiffs in private antitrust suits have contended that they are the victims of continuing conspiracies, a direct reversal of the pattern set after the *Lawlor* decision.[40] When the courts find that a continuing conspiracy does exist, however, the plaintiffs cannot be certain what the result will be. The uncertainty is due primarily to the lower courts' failure to uniformly interpret and apply the "*Zenith* exception." The lack of uniformity in turn results from the courts' failure to follow the *Zenith* decision as it was written and as the Supreme Court meant for it to be applied.

Two major interpretations of *Zenith* have evolved in the lower courts. The first appeared shortly after the *Zenith* decision in the Second Circuit's ruling in *Ansul Company v. Uniroyal, Inc.*[41] One of the plaintiffs, Louisville Chemical Company, alleged that it had been injured as a result of a "continuing . . . illegal market restraint" on the part of Uniroyal. The district court had held, however, that the only violation Louisville could complain of was the initial termination of sales effected by Uniroyal in 1963. Since Louisville had not brought suit until May 31, 1968, the lower court concluded that recovery was barred under section 4(b).[42] The Second Circuit reversed this lower court decision, holding that Louisville had been the victim of a continuing conspiracy. The court stated that, in *Zenith,* the Supreme Court had

> held that a plaintiff in an antitrust action may recover damages occurring within the statutory limitations period that are the result of conduct occurring prior to that period if, *at the time of the conduct,* those damages were speculative, uncertain, or otherwise incapable of proof.[43]

40 *See* text accompanying note 7 *supra.*
41 448 F.2d 872 (2d Cir. 1971).
42 Ansul Co. v. Uniroyal Inc., 306 F. Supp. 541, 569 (S.D.N.Y 1969).
43 448 F.2d at 884 (emphasis added).

The court thus permitted Louisville to recover damages for the period beginning four years prior to the date suit was brought, May 31, 1964, because the damages could not be proved with reasonable certainty at the time of the initial violation in the conspiracy, sometime in late 1963. Recovery was therefore allowed more than four and one-half years after the last violation complained of by the plaintiff.

Interpretations similar to that of the Second Circuit have also been found in the decisions of the Third and Ninth Circuits. In its decision in *Continental-Wirt Electron. Corp. v. Lancaster Glass Corp.*,[44] the Third Circuit initially viewed the ruling in *Zenith* differently from the Second Circuit's treatment. When the court went to apply *Zenith* to the facts, however, it did so in the same fashion as the Second Circuit had in *Ansul.* The court initially stated that the reason Zenith had been permitted to recover the future damages of which it complained was because those damages had been too speculative during the time that section 4(b) would have permitted it to sue, that is, within four years after the violations. According to the court of appeals, the Supreme Court "reasoned that Zenith should be permitted to file its action when it could compute its damages."[45] When the court applied *Zenith* to the facts of the case, however, it instructed the district court on remand that should it find that some portion of the plaintiff's damages were too speculative to be ascertainable *at the time of the overt act which produced them,* those damages which became ascertainable within the four-year period prior to the filing of the complaint would be recoverable.[46] No mention was made of the need to determine that the damages were unascertainable during the initial limitations period, within four years of the alleged violation, as the court had originally stated would be the case.

The Ninth Circuit's application of *Zenith* is found in *Hanson v. Shell Oil Co.*[47] In the district court proceedings, the trial judge had instructed the jury that in order for the plaintiff to recover it was necessary to find that the defendant had committed overt acts in violation of the antitrust laws within four years of the date suit was brought. The court of appeals found this instruction to be erroneous, concluding that "*Zenith* stands for the proposition that a plaintiff may recover for acts violative of the antitrust laws committed prior to the statute of limitations date, but that he may only recover those damages for such acts which accrued and became ascertainable within the period of the statute."[48] Unlike the Second and Third Circuits, no direct reference was made to the need to determine whether the damages were speculative at the time of the alleged violation. This requirement, however, can be inferred from the court's opinion. Although the court demanded the damage become "ascertainable" during the statutory period preceding the suit, it noted no corresponding requirement that there be an initial determination that the damage would have been speculative had the suit been brought within four years of the violation.

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44 459 F.2d 768 (3d Cir. 1972).
45 *Id.* at 770.
46 *Id.*
47 541 F.2d 1352 (9th Cir. 1976).
48 *Id.*

Under this "ascertainment at violation" test expounded by the three circuits, the court would need only to determine that the damages in a continuing conspiracy would have been speculative at the time of the violations complained of by the plaintiff. As a result, a plaintiff may bring an action for those damages within four years of any date when they cease to be speculative, regardless of whether the court did or would have determined that those damages were ascertainable within the initial four-year statutory period following the violations. Thus, a plaintiff who was the victim of a continuing conspiracy in the years up to and through 1975 (whose damages from the 1975 violations were not ascertainable in 1975, but which ceased to be speculative in 1978) could bring suit until 1982 for those 1975 violations. It is clear that this was not the intended result of the Court in *Zenith* nor does it follow the congressional purpose underlying section 4(b).[49]

In *Zenith* the Supreme Court stated that in those instances where a court had or would have determined that damages were too speculative to recover within four years of the conduct, then, and only then, would "the cause of action for future damages . . . accrue . . . on the date that they are suffered."[50] Where a court would not have found that the future damages were speculative at a point four years after the alleged violation, there could be no right to bring suit to recover at a date after the running of the initial statutory period. In the previous example, the plaintiff in the continuing conspiracy lasting through 1975 could not bring suit for those violations any later than 1979 since the damages resulting from those violations were ascertainable at a date (1978) within the initial statutory period.

This example manifests the compromise inherent in the *Zenith* decision. Although the Court did not wish to limit plaintiff's recovery when the damages were genuinely speculative, it did wish to put a limit on his right to bring action should those damages cease to be speculative within the initial statutory period.

The "ascertainment at time of violation" test is not only an improper reading of *Zenith,* but is also inconsistent with the congressional intent behind section 4(b). In creating section 4(b) Congress wished to place some limit on the plaintiff's right of action, as there is some point in time when other considerations outweigh the benefits of the private antitrust suit.[51] Two such considerations were the burden of continuing antitrust actions on the administration of the courts and the burden on potential defendants.[52] Under the "ascertainment at time of violation" test, however, the burden on potential defendants is increased significantly. By using this formula, potential defendants may be subject to suit long after the end of the statutory period. Under the "*Zenith* exception," however, as correctly applied, the burden on the defendants in a continuing conspiracy is usually no greater than in a noncontinuing conspiracy. Normally the cause of action will accrue at the time of violation, with the statute of limitations barring suit four years after that date. Only when the plaintiff's right of recovery outweighs the defendant's right to repose does the "*Zenith* exception" extend the statutory limitation.

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49 *See* text accompanying notes 2 and 3 *supra.*
50 401 U.S. at 337.
51 *See* text accompanying notes 4 and 5 *supra.*
52 Wheeler & Jones, *supra* note 16, at 78.

In *Poster Exchange, Inc. v. National Screen*[53] the Fifth Circuit set out its own unique interpretation of *Zenith,* one which completely ignores the Supreme Court's opinion.[54] According to the Fifth Circuit, before the plaintiff can sue for future damages in a continuing conspiracy, he is required to prove that his new claim for damages is based on a violation actually occurring during the statute of limitations period preceding the date suit is brought.

In *Poster Exchange,* the court accepted the proposition that a plaintiff may have continually accruing rights of action in a continuing conspiracy. Basing its ruling on the Supreme Court's statement in *Zenith* that "[g]enerally, a cause of action accrues and the statute begins to run when the defendant commits an act that injures a plaintiff's business,"[55] the court concluded, however, that the Supreme Court had ruled that it is still necessary for a newly accruing claim for damages to be based on some injurious act actually occurring during the limitations period.[56]

No rational basis exists for this interpretation of *Zenith,* other than a failure by the court to give *Zenith* a complete and impartial reading.[57] The court apparently took from *Zenith* only that which supported its conclusions. To require that a new violation take place within the four-year period prior to suit and that this violation cause the damages for which the plaintiff seeks recovery vitiates the rationale underlying *Zenith.*[58] The "*Zenith* exception" would be superfluous under the Fifth Circuit's ruling since they are forcing the private complainant to recover in the same manner as any other antitrust plaintiff, regardless of whether he is the victim of a continuing conspiracy or a noncontinuing conspiracy. Precisely because the Supreme Court realized the difference between plaintiffs in continuing conspiracies and noncontinuing conspiracies did it create the "*Zenith* exception."

V. Policy Considerations—A Possible Solution

Although the Supreme Court in *Zenith* had attempted to decide the issue of future damages in favor of the greatest justice for the plaintiff, it failed, however, to contemplate the possible ramifications of its decision upon potential antitrust litigants.

Certainly, the Court's decision was in harmony with the objectives of section 4 of the Clayton Act, namely, that plaintiffs be adequately compensated for antitrust violations,[59] as well as assuring that private antitrust actions remain "a bulwark of antitrust enforcement."[60] By so deciding the case, however, the Court made it more difficult for the plaintiff to recover future damages in a single action, because courts would no longer need to be lenient

53 517 F.2d 117, 124 (5th Cir. 1971).
54 *See generally* Wheeler & Jones, supra note 16.
55 401 U.S. at 338.
56 517 F.2d at 128.
57 The Fifth Circuit followed the reasoning of *Poster Exchange* more recently in Imperial Point Colonnades Condominium v. Mangurian, 549 F.2d 1029 (5th Cir. 1977). It again emphasized that there must be a new act committed within the limitation period and that that act must cause the complained of damage.
58 It should be noted that the Fifth Circuit's interpretation follows the argument made by HRI in *Zenith,* an argument which the Court clearly rejected.
59 Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. at 139.
60 *Id.*

in determining whether damages were speculative.[61] No longer would there be the fear that should the court refuse to grant the plaintiff recovery in the present action, the plaintiff would be denied the possibility of ever receiving adequate compensation. Under *Zenith* the plaintiff would no longer be barred from bringing a later suit to recover those speculative damages. The result requires, of course, the plaintiff to bring several actions, perhaps many years into the future, in order to complete his recovery.[62]

The possible detrimental effect of *Zenith* on potential plaintiffs can be shown by the following example. The victim of a continuing conspiracy in 1975 could obtain recovery in a suit brought in 1979 for damages he claims will occur from 1979 to 1990 by reason of the 1975 violations, if the court determines that these damages are not speculative at the time of trial. Given the futurity of the damages and the post-*Zenith* knowledge that should the court determine that the damages are speculative, however, the plaintiff would not be barred from bringing a later suit, the court may place a constraint on its previously liberal attitude on what is considered speculative. Although it is true that *Zenith* will permit the plaintiff to bring subsequent suits when the damages become ascertainable, the court's new, more limited definition of what is speculative, may force the plaintiff to bring suit in 1983 for the damages which have become ascertainable from 1979 to 1983, then again in 1987 for the period 1983 to 1987, and so on. Although some of the damages would probably have been speculative in 1979, as the court would determine, there would be no need to restrict the definition of what is speculative solely because of the existence of the "*Zenith* exception." Such a restriction would be especially harmful given the possible ramifications of such a restrictive interpretation on potential plaintiffs, not to mention its effect on judicial administration.

Future plaintiffs could also have been harmed by the Supreme Court's decision in *Zenith* since it presents a new defense to plaintiff's actions. Defendants can now argue that plaintiffs' suits based on once-speculative damages are barred, contending that the damages had not in fact been so speculative as to bar recovery in the original statutory limitations period.

Regardless of the possible effect on future plaintiffs, the ramifications of *Zenith* for potential defendants is sure to be much greater. *Zenith* presents a real possibility that defendants will be faced with costly and frequent defense of successive antitrust suits, having to defend what would have once been considered stale claims. For example, the continuing conspiracy victim who is the subject of conspiratorial action in 1975 could recover any future damages which would not be provable by 1979 in subsequent proceedings. These subsequent actions may be brought at almost any time in the future, regardless of how many years have passed since the violation, with the only limitation being that the actions be brought within four years of the date the damages become ascertainable.

Such an application of *Zenith* would frustrate the congressional purpose underlying the enactment of section 4(b), no less than the misdirected interpretations of the courts of appeals. This and other undesirable effects of the

61 *See generally* 38 J. AIR L. & COM. 67 (1972).
62 *Id.*

various applications of *Zenith* may be obviated, however, while still retaining the beneficial aspects of *Zenith.*

The first, and most obvious conclusion which can be drawn from this discussion of *Zenith* and subsequent cases, is that for there to be a true solution to any problem related to *Zenith,* a consistent and objective interpretation of the decision is necessary. In applying *Zenith* the courts must:

1) Determine if the damages complained of are the result of a continuing antitrust violation (if not, the statute of limitations will run from the date of violation);

2) Determine when the violations which gave rise to the damages took place, remembering that under the "*Lawlor* rule" each successive day of the continuing conspiracy is a new violation;

3) Determine if the damages complained of were speculative at the end of four years subsequent to the date of violation, that is, at the latest date that suit could be brought under the normal statutory scheme; if so,

4) Determine when the damages no longer were considered to be speculative, *i.e.,* when they became ascertainable;

5) Determine if the present action has been brought within four years of the date damages became ascertainable.

The most desirable solution to the potential problems that may result from *Zenith,* once it is uniformly applied, is for the courts to accept a standard for determining when damages are speculative, a standard which is strict enough to deny recovery when the damages are truly incapable of ascertainment, but lenient enough to permit the greatest possible recovery in one proceeding. Such a standard has already been created by the Supreme Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*[63] and *Bigelow v. RKO Pictures, Inc.*[64] In those decisions the Court held that damages are not speculative when and if the jury can "make a just and reasonable estimate of the damage based on relevant data."[65] In these circumstances the proof presented to the jury may be "probable and inferential, as well as direct."[66]

It follows from this definition of speculative damages that when presented with a logical economic model which sets out with reasonable certainty what the plaintiff's future damages will be, a judge or jury may reasonably conclude that the damages are not speculative, and thus recoverable. In view of the advanced state of economics today, such a model could be created with relative ease. One such model, "The Future Discounted Profits Model" was created in light of the Supreme Court's decision in *Zenith* and attempted to render future damages more provable and more susceptible of ascertainment.[67] Although

63 282 U.S. 555 (1931).
64 327 U.S. 251 (1946).
65 *Id.* at 264.
66 *Id. See generally* Charlotte Telecasters v. Jefferson-Pilot Corp., 546 F.2d 570, 573 (4th Cir. 1976).
67 Hoyt, Dahl, & Gibson, *Comprehensive Models for Assessing Lost Profits To Antitrust Plaintiffs,* 60 MINN. L. REV. 1233 (1976). This model postulates that the plaintiff who has lost his rightful share of a certain market will be able to regain that share at the same rate as his original rate of entry, given that in both instances a

this model might not be suited to all situations, it is a step in the right direction. The development of such economic formulae will permit antitrust victims full recovery in the fewest number of proceedings, while also protecting the defendants from the possibility of the protracted or delayed pendency of antitrust actions.

VI. Conclusion

Plaintiffs wishing to recover future damages in private antitrust proceedings pursuant to section 4 of the Clayton Act, in particular those damages that result from violations in a continuing conspiracy, have benefited from an increasing flexibility of the courts to permit the greatest possible recovery in one proceeding. Under the "*Lawlor* rule," as presently applied, plaintiffs are limited as to the violations that they may complain of, but they are permitted to recover damages that occur before and after trial which are the result of violations occurring before trial. The "*Zenith* exception" was created, in part, to assure that those damages which were not recoverable as a result of the interaction of the "*Lawlor* rule" and the statute of limitations (those future damages which are still considered speculative within four years of the violation) would still be recoverable at some later date, even though the normal statute of limitations period would have run.

With the increasing flexibility in permitting recovery by antitrust plaintiffs, the courts have often ignored the plight of defendants who may be the subject of the increasing number of antitrust suits. Courts must, therefore, look at the potential ramifications of this liberalized attitude on potential antitrust defendants, as well as its effect on plaintiffs, with a view towards finding a balance where the plaintiffs' rights do not outweigh the defendants' concurrent rights. The median may be found if the courts correctly apply the "*Zenith* exception," and fully utilize the benefits of the science of economics to determine when damages are to be considered speculative. By doing this, the courts will ensure that plaintiffs receive their full measure of recovery, while defendants are not overburdened by the weight of defending numerous, lengthy antitrust suits.

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free market existed. "Calculation of future profits is made by multiplying the lost market share times projected market sales and the plaintiff's projected profit rate. These values are in turn discounted on a yearly basis to arrive at the present value of future damages." *Id.* at 1252. The three variables necessary in this model are: (1) the time it will take the plaintiff to gain or regain its rightful share of the relevant market following cessation of defendant's illegal practices (this growth rate can sometimes be determined by reference to plaintiff's actual experience in originally entering the market, if prior to defendant's illegal conduct, or sometimes by using the yardstick approach, that is, by using a company similar to plaintiff's as a basis for reference), (2) the plaintiff's rate of profit, determined by using plaintiff's historical profit in the relevant market or related market or using the yardstick approach, again; and (3) the size of the future market, determined by a mathematical model or expert testimony, or both. *Id.* at 1253-54.